



Paper No. 7

SHANKS & HERBERT
TRANSPOTOMAC PLAZA
1033 N. FAIRFAX STREET, SUITE 306
ALEXANDRIA VA 22314

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MAY 20 2002

In re Application of	:	OFFICE OF PETITIONS
Toui et al.	:	DECISION DISMISSING
Application No. 09/851,983	:	PETITION
Filed: 10 May, 2001	:	
Attorney Docket No. 0261-0008	:	

This is a decision on the petition filed by facsimile on 11 March, 2002, requesting that the above-identified application be accorded a filing date of 9 May, 2001, rather than the presently-accorded filing date of 10 May, 2001.

Petitioners assert that the application was filed by courier at the USPTO Customer Service window on 9 May, 2001, but that the courier was not given a stamped itemized postcard upon depositing the application with the USPTO. Petitioners also assert that a date-stamped return receipt postcard was never received in the mail from the USPTO. The petition is accompanied by a declaration of petitioner's registered patent counsel, Joseph G. Contrera, stating that the application was deposited with the courier on 9 May, 2001.

The arguments have been considered, but are not persuasive. The U.S. Patent and Trademark Office (Office) file is the official record of the papers originally filed in this application. a review of the papers originally filed reveals that no pages of specification or sheets of drawings were filed on 9 May, 2001. An applicant alleging that a paper was filed in the Office and later misplaced has the burden of proving the allegation by a preponderance of the evidence. The fact that petitioner believes the drawings were among the papers he included in the application is not more persuasive than the actual papers shown to have been received by the official file.

At the outset, it is unclear why, if an itemized postcard was present at the time the application was filed, the courier did not obtain a USPTO "Office date" stamp on the itemized postcard receipt at the time the courier deposited the application with the USPTO. The showing of record suggests that the courier did not request that receipt of the application papers be acknowledged on the itemized postcard receipt prior to leaving the customer service window. Additionally, while the failure of petitioners to receive an itemized return receipt postcard is an unfortunate situation, petitioners have presented no evidence that the application was deposited on 9 May, 2001, rather than 10 May, 2001.

Furthermore, counsel's declaration of facts was filed nearly 10 months after the asserted date of deposit and recites personal remembrances of the preparation and filing of these papers. The papers are not unusual, and it is not understood why the filing of this particular application would stand out in such detail in the declarant's memory, particularly in view of the fact that declarant prepared and mailed similar papers on a routine basis. Lastly, the declaration of facts states only that the application papers were given to the courier, not that they were actually filed in the USPTO or deposited with the USPS.

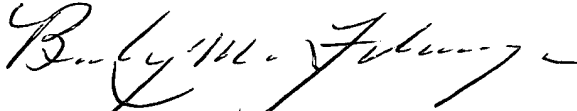
Had petitioners mailed the application papers by USPS Express Mail Post Office To Addressee service of the USPS, petitioners could have sought relief from their predicament under the provisions of 37 CFR 1.10(e), by promptly providing a copy of the patent-related documents, having affixed thereon the Express Mail label number, as well as a copy of the Express Mail mailing label showing a USPS "date-in" receipt date, and would have obtained as a filing date for any non-received correspondence the "date-in" given by the USPS on the Express Mail mailing label.

As petitioners have not shown that the application was deposited on 9 May, 2001, the petition will be dismissed.

Petitioners submitted a check for \$200.00 for the petition fee which is excess of the petition fee of \$130.00. The \$70.00 overpayment will be credited to counsel's deposit account, No. 50-0622, as authorized in the Information Disclosure Statement filed on 5 March, 2002.

The application is being returned to the Office of Initial Patent Examination for further processing with the presently-accorded filing date of 10 May, 2001.

Telephone inquiries specific to this matter should be directed to Petitions Attorney Douglas I. Wood at (703) 308-6918.

A handwritten signature in cursive script, appearing to read "Beverly M. Flanagan", with a horizontal line extending from the end of the signature.

Beverly M. Flanagan
Supervisory Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy